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No. 1072

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ALBERT H. HOLMES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Under Rule 19(1)(b):

The trial court has so far departed from the accepted and usual course of judicial proceeding in sanctioning such a departure from the rules of evidence, as to call for an exercise of this court's power of supervision:

(1) Did an anonymous notation, authored by a person in no way connected with the selective service system, which was lodged in petitioner's selective service file, which asserted that he had failed to report for civilian service as directed, qualify for admission in evidence as a business record exception to the hearsay rule under the Federal Business and Official Records Act (28 U.S.C. Sections 1732, 1733)? 9

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Petitioner, Albert H. Holmes, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on November 20, 1967, in the above entitled cause.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix A hereto, *infra*, page App. 1, is unreported at the present.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on November 20, 1967. A timely petition for rehearing was denied on January 2, 1968. This Petition for Writ of Certiorari will be timely filed on or before February 1, 1968.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Did an anonymous notation, authored by a person in no way connected with the selective service system, which was lodged in petitioner's selective service file, which asserted that he had failed to report for civilian service as directed, qualify for admission in evidence as a business record exception to the hearsay rule under the Federal Business and Official Records Act (28 U.S.C. Sections 1732, 1733)?

(2) If question (1) is answered in the affirmative, does such an application of the Federal Business and Official Records Act constitute a denial of petitioner's Sixth Amendment right to confront the witness against him?

(3) Absent a declaration of war, does an order to report for civilian work under the Uniform Military Service and Training Act, constitute an order of involuntary servitude in violation of the 13th Amendment and the due process clause of the 5th Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

The 6th Amendment to the Constitution of the United States provides in material part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

The 13th Amendment to the Constitution of the United States provides in material part as follows:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The 5th Amendment to the Constitution of the United States provides in material part as follows:

> "No person shall be . . . deprived of life, liberty or property without due process of law; . . ."

STATUTES INVOLVED

28 U.S.C. §1732(a) provides in material part:

> "In any court of the United States . . . any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business' as used in this section, includes business, profession, occupation, and calling of every kind."

28 U.S.C. §1733(a) provides in material part as follows:

"Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

Rule 44 of the Federal Rules of Civil Procedure (made applicable to these proceedings by Rule 27 of the Federal Rules of Criminal Procedure) provides in material part:

"(a) Authentication.

(1) *Domestic.* An official record kept within the United States, or any state, . . . or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or by a copy attested by the officer having legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody . . .

"(b) Lack of Record. A written statement that after diligent search no record or entry of a specific tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this Rule . . . is admissible as evidence that the records contain no such record or entry.

"(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law."

STATEMENT OF THE CASE

The Petitioner, Albert H. Holmes, a conscientious objector, was indicted under a charge of violating the Universal Military Training and Service Act (50 U.S.C. §462), the indictment alleging that he knowingly failed to report for civilian work at the Elgin State Hospital, Elgin, Illinois, on the 21st day of February, 1966 purportedly under an order to report for civilian work contributing to the maintenance of the national health, safety and interest. By timely motion and objection, he challenged the constitutional validity of the prosecution on the basis of the 5th and 13th Amendments to the Constitution of the United States.

The defendant waived trial by jury and entered a plea of "Not Guilty". The case proceeded to trial on March 6, 1967. The government produced three witnesses, an agent for the Federal Bureau of Investigation who merely identified the Petitioner in court as being the same person he had taken into custody after the indictment, and an employee of Elgin State Hospital whose testimony was stricken when he admitted that he did not have personal knowledge of whether the Petitioner had reported for civilian work on February 21, 1966, the date charged in the indictment.

The third witness was an employee of the State of Illinois Selective Service Headquarters in Springfield, Illinois (*not* the Clerk of Local Board 132 of Morris, Illinois), who testified that Government Exhibit B, which on its face purported to be Petitioner's Selective Service file, was a file kept and maintained in the regular and ordinary course of the business of Local Board No. 132.

Over objection from the defendant, the trial judge admitted into evidence the entire Selective Service file as Government Exhibit B-1 through B-63, inclusive. The government then rested. The only evidence of the Petitioner's alleged failure to report for civilian work consisted of a document in the above-described Board file, which on its face purported to be a letter from the Board to the hospital reading as follows: (Government Exhibit B-61):

"21 Feb. 1966

Elgin State Hospital
750 South State Street
Elgin, Illinois

Gentlemen:

Mr. Albert H. Holmes was ordered to report for civilian work at Elgin State Hospital for hospital work 21 Feb. 1966. He reported to the local board and stated he refused to accept this work and would not proceed to place of employment.

Please submit a statement to the local board to that effect.

Respectfully yours,
For The Local Board,
/s/ *Bernice Heggen*
(Mrs.) Bernice Heggen, Clerk"

Beneath the signature of the Board Clerk and in a different style of typewriter type, appears an anonymous notation:

"This office has no knowledge of the above named ever appearing at this office for an interview."

There is utterly no identification of the declarant of that statement either on the face of the document, at any other place in the Selective Service file, or in any other evidence produced at the trial. The government witness from the State Hospital was not called upon to and did not identify the document.

The document bears on its reverse a stamp reading "Received, Hospital Post Office, '66 Feb. 23, A.M. 8:39—Elgin State Hospital", and on its front side a "Received" stamp of the Local Board dated March 1, 1966.

The document was received in evidence over Petitioner's timely objection (transcript, pp. 12-15 incl., pp. 16-20 incl., pp. 23-29 incl., and particularly pp. 30-33 incl.). Said document was the basis for the District Court's finding of guilt (transcript of proceedings, p. 73).

At the close of the government's case, the defendant moved for a judgment of acquittal. The motion was denied by the trial judge. The defendant, relying upon the motion for a judgment of acquittal, rested without producing any evidence.

The Petitioner was sentenced to three years imprisonment. He appealed. The Court of Appeals for the Seventh Circuit affirmed the trial court (opinion by Duffy, J.) with one judge dissenting (Fairchild, J.).

Recognizing that the anonymous notation at the foot of Exhibit B-61 was the "keystone" to the government's case, the two-judge majority of the Court of Appeals held the document admissible as a business or official record exception to the hearsay rule under either Rule 44(c) of the Federal Rules of Civil Procedure, or §§1732(a) and 1733(a) of Title 28, U.S.C. The majority specifically found that "defendant's argument that his 6th Amendment right to confront the witnesses against him was violated, is without merit." (Appendix A. p. App. 4).

Judge Fairchild, in dissent, concluded that the document was *not* admissible as a business or official record

exception to the hearsay rule and that the majority was ". . . applying too lax a standard to the sufficiency of the government's case, and are impermissibly leaning on defendant's failure to testify." Judge Fairchild also stated:

> "The anonymous and vague notation at the foot of the letter is the keystone of the prima facie case. If that notation is inadmissible to prove failure to report, the government failed." Fairchild, J., dissenting. (Appendix A, p. App. 7.)

REASONS FOR GRANTING THE WRIT

(1) The reliance by the trial court and by the Court of Appeals for the Seventh Circuit, upon the provisions of Rule 44 of the Federal Rules of Civil Procedure for the Admission of Evidence in this case was clearly misplaced, and under Rule 19 of this Court has so far departed from the accepted and usual course of judicial proceedings, or the action of the Court of Appeals has so far sanctioned such a departure by the trial court, as to call for an exercise of this Court's power of supervision.

Rule 44 deals with the "Authentication" of copies of official documents and records. The Rule leaves intact underlying tests of admissibility of the *contents* of such documents. Thus, it provides that copies may be resorted to only when the document itself is "admissible for any purpose." Here there is no question of "authentication." The question was the admissibility of the contents of the patently hearsay notation at the foot of Exhibit B-61, to prove the truth of the matter asserted in it.

Nor does Rule 44(c) relating to the proof of the lack of an official document come into play. That rule requires that the person asserting the absence of the record be identified and attest to a diligent search for the record called for. Those conditions were not met here.

Therefore, it is evident that the admissibility of the hearsay notation must depend upon other grounds. The majority of the Court of Appeals concluded that it was admissible as a business or official record under §§1732 and 1733 of Title 28. The dissent indicated disagreement.

Is this notation such a record? The legislative history of §1732 suggests that the act was intended to cover the financial, shop book type of records, not anonymously written correspondence. See, S. Rep. No. 1965, 74th Congress, 2nd Sess., pp. 1-2. There is no proof that the notation was "made in the regular course of . . . . business." §1732(a). Indeed, there is no proof as to what business "made" it, although the Court of Appeals inferred that the hospital did.

Assuming, arguendo, that the conditions precedent to admissibility — making in the regular course of business — were met, can it be said that the other requirements of necessity and convenience, which prompted adoption of the business record exception to the hearsay rule (Wigmore on evidence, 1940 ed., §§1517-1528), are present here? Is this such a complicated, outdated transaction or event that the Clerk of Local Board No. 132 and the appropriate official of the hospital, could not be called as witnesses in open court? Is it necessary in cases of this kind to resort to the business record exception to the hearsay rule with its concomitant absence of cross examination? (Wigmore, *Supra.*)

This Court has not had an occasion to consider the Federal Business and Official Records Act since *Palmer* v. *Hoffman*, 318 U.S. 109, 111-115 (1943).[1] The court has never considered the Act within the framework of a criminal case. Yet, the decisions of the several circuits indicate that the government has consistently employed the Act in its prosecution of crimes, and is doing so in virtually all cases under the Universal Military Training and Service

[1] It is clear that the anonymous memo in the instant case does not meet the standards of admissibility spelled out in *Palmer* v. *Hoffman, Supra.*

Act. Certainly this case represents the outer-most limits of the application of the Act. Cf., *LaPorte* v. *United States*, 300 F.2d 878, 800 (C.A. 9, 1962), where the supervisor of one charity, to which defendant had been ordered to report, identified the non-report statement as a record made by the charity in the usual course of its business. Has this decision gone too far?

In the exercise of its supervisory powers this Court should issue its Writ of Certiorari in order to decide whether this case, and others akin to it represent a proper application of §§1732 and 1733.

(2) Assuming, arguendo, that the anonymous notation on Exhibit B-61 does meet the standards of admissibility under §§1732 and 1733, there emerges the serious constitutional question of whether the statute, so applied, violates Petitioner's 6th Amendment right to confront the witnesses against him? Compare, *Tot* v. *United States*, 319 U.S. 463 (1943). Certainly the notation stands as the declaration of an anonymous accuser —"Petitioner did not report."

While the legislative history of the Federal Business Records Act indicates that the Congress intended its availability in criminal cases, the types of records that Congress had in mind were of the financial, shop book variety. See, *United States* v. *Cotter*, 60 F.2d 689, and other cases cited in S. Rep. No. 1965, 74th Congress, 2nd Sess., pp. 1-2. The several Courts of Appeals have consistently so construed it without serious constitutional challenge. In addition, the judicial history of the Uniform Business Records Act (which is in all essential respects similar to §1732) suggests that the courts of those states which have adopted the Act have applied it in criminal cases, without serious challenge on constitutional grounds.

See, 9-A Uniform Laws Annotated (Business Records as Evidence) 506-530 and cases there collected.

However, the Ohio Supreme Court has recently held that application of the Business Records Evidence Act in a criminal case constitutes an impermissible violation of a defendant's right to confront his accusers. *State* v. *Tims,* 9 Ohio St. 2nd 136, 224 N.E. 2d 348 (1967), citing with approval and as controlling this Court's decision in *Pointer* v. *Texas,* 380 U.S. 400 (1965).

Does the evidence in the case at bar square with this Court's recent decisions in *Pointer* v. *Texas,* 380 U.S. 400 (1965), and *In Re Gault,* 387 U.S. 1 (1967)? In *Pointer* the court held that the use of the contents of a preliminary hearing transcript which contained the accusation of an identified accuser, violated Pointer's 6th Amendment right of confrontation. In *Gault* the court suggested (but found it unnecessary to decide) that resort to a Probation Department "referral report" would do similar violence to Gault's right of confrontation. While it does not appear from those decisions that a business record foundation approach was attempted, it seems evident that those documents could have been qualified as records "made" in the "regular course" of the "business" of the court *(Pointer)* or the Probation Department *(Gault).* Both Texas *(Pointer)* and Arizona *(Gault)* have adopted "business records as evidence" acts. 16 West's Arizona Revised Statutes Annotated 451; 11 Vernon's Texas Revised Civil Statutes Annotated, Art. 3737E (1967 pocket part, p. 161). Would a business record foundation, such as that employed in the case at bar, have worked any significant difference in the results in Pointer and Gault?[1] Petitioner

[1] While *Pointer* and *Gault* were state cases, they are relevant here because they were decided under the 6th Amendment, made applicable to the states by the 14th Amendment.

thinks not. See also, *Turner* v. *Louisiana*, 379 U.S. 456 (1965) and *Parker* v. *Gladden*, 385 U.S. 363 (1966).

If such be the case, then reliance upon the anonymous notation on Exhibit B-61 abridged his 6th Amendment right to confront the witnesses against him. *A fortiorari*, because it was the *only* evidence which tended to support the District Court's finding.

Accordingly, Petitioner respectively submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal Constitutional Law.

(3) The Court of Appeals for the Seventh Circuit has decided in this case an important question of Federal Constitutional law which has not been, but should be, settled by this court, that is, is an order to report for civilian work, in the absence of a declared war or state of national emergency, void and in violation of the 13th Amendment of the Constitution of the United States?

The Petitioner was charged in the indictment with becoming a registrant at Local Board No. 132, Morris, Illinois, and being classified in Class I-O, and being ordered to report for civilian work contributing to the maintenance of the national health, safety and interest at the Elgin State Hospital, Elgin, Illinois, and knowingly failing to report for such civilian work in violation of §12, Universal Military Training and Service Act, §462, Title 50 Appendix, United States Code.

The 13th Amendment to the United States Constitution states that:

> "Neither slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Clearly, any order to report for civilian work, in the absence of a declared war or state of national emergency would be void and in violation of the 13th Amendment, as previously stated, in that it constitutes involuntary servitude, and is not being done as punishment for any crime.

By establishment of the I-O Classification, the Congress of the United States has recognized that a person who is conscientiously opposed to killing of a fellow human, or to military service, should be granted an exemption from compulsory military training. Having created the exemption for conscientious objectors, the Congress has recognized that such persons *should* have the legal right to follow the dictates of their conscience. The legislation holds the right of conscientious objection, and the resultant exemption to be of greater import than compulsory military conscription.

The obvious intent of the framers of the Constitution in view of the 13th Amendment, coupled with the 5th Amendment provision that no person shall be deprived of his life, liberty or property without due process of law, is that the liberty, privacy and integrity of the citizen would be inviolate and not subject to disturbance by the government, with the possible overriding exception of the necessity of compulsory military conscription in times when the overriding emergency and public considerations have been recognized by this Court as taking precedence. However, the Congress, having granted an exemption from compulsory military conscription to those labeled "Conscientious Objectors" has exceeded the constitutional powers granted to it by the United States Constitution, as limited by the 13th Amendment, in that the conscientious objector should then be recognized as having the same right of liberty and privacy, and to be free of involuntary servitude, as any other citizen of the United States.

This question is another ramification of the broad question which has troubled this Court for a century: The de jure obligation of a citizen to give of himself to his country, absent a de jure declaration by the Congress that the very existence of the country is threatened. See e.g. the *Prize Cases,* 2 Black 635, 17 L.ed. 459; *Ex Parte, Milligan,* 4 Wall 2, 18 L.ed. 281; *Johnson* v. *Eisentrager,* 339 U.S. 763. Last term Mr. Justice Douglas in his dissent from the denial of certiorari in *Mitchell* v. *United States,* 386 U.S. 972 brought out certain of the questions presented by the prosecution of one who refused induction into the military service. This term Mr. Justice Douglas and Mr. Justice Stewart, in their dissents from the denial of certiorari in *Mora et al.* v. *McNamara,* 388 U.S. ....., 88 S.Ct. 282, noted the questions presented by the judicial efforts of three in the military to enjoin the enforcement of an order that they participate in the military activity in Viet Nam. Many of those questions are presented here.

Of course, it can be urged that Petitioner, having been accorded Conscientious Objector status, has been relieved of the legal dilemma of *Fealty* v. *"Crime against Peace"* which was noted in *Mitchell, Supra.* But that is no answer to the question whether the Government has the power to demand another form of involuntary servitude of its citizens without first declaring that the continued existence of the Government is threatened. The latter, it is submitted, is what a declaration of war is.

The Founders of the Nation clearly recognized that government, to assure its self-preservation, requires a greater goal upon its people in time of war than otherwise. See Constitution of the United States, Art. I, §9, ¶2; Amendment III; Amendment V. And while the words "to de-

clare war" may be "outmoded phraseology"[1] in today's school of national politics, their basic meaning *vis a vis* the relation of the people to this Nation has not changed. That meaning is for this Court to decide in the same manner it has decided the myriad other Constitutional phrases which determine the relationship of the individual to the state.

Implicit within the foregoing reasons for the court assuming jurisdiction, is the contention of the Petitioner that, requiring a *conscientious objector,* who has been found entitled to an exemption from compulsory military service, to perform compulsory civilian work, results in the creation of an arbitrary and discriminatory classification by requiring civilian work to be performed by conscientious objectors ONLY. Other categories of persons who are eligible for the draft, but exempted for various reasons, have nevertheless *not* been required to perform civilian work in lieu of induction. For example, the general principals of classification are stated in Selective Service Regulations 1622.1 and 1622.2. Under the various classes are such categories as "I-S: Student deferred by statute", "I-Y: Registrant qualified for military service only in time of war or national emergency", "II-S: Registrant deferred because of activity in study", "III-A: Registrant with a child or children; and Registrant deferred by reason of extreme hardship to dependents", "IV-A: Registrant who has had completed service; sole surviving son", "IV-F: Registrant not qualified for any military service", and finally "V-A: Registrant over the age of liability for military service".

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[1] Mr. Katzenbach, testifying at Hearings on S. Res. No. 151, 90th Cong. 1st Sess., at 81 (1967).

In observing these various categories of persons exempt from compulsory military service, only in the case of the physical disability or mental disability of a person classified IV-F, is there a question raised of physical or mental inability to perform *civilian* service in lieu of induction. All of the other categories, found to be exempt or unavailable for military service, do not require the performance of civilian service in lieu of induction. Certainly the exemption of persons in those classes from military service, without a corresponding obligation for civilian service in lieu of induction, grants to persons so classified an arbitrary and superior right to that of a person classified as a "Conscientious Objector" who has likewise been found entitled to an exemption but who has then arbitrarily been required to perform civilian services in the nature of involuntary servitude. This arbitrary classification, by discriminating in the manner described, has deprived persons in the classification of "Conscientious Objector" of the equal protection of the law, and has deprived them of their life, liberty and property without due process of law in violation of the 5th Amendment of the United States Constitution.

This case presents these important Federal Constitutional questions in a clearly justiciable setting. Therefore, it is respectfully submitted that this Court should issue its Writ of Certiorari in order that it may consider and decide them.

CONCLUSION

For the reasons severally and collectively assigned here, it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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